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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VIVIAN A. SCHRAMM and
MICHAEL R. SCHRAMM

Appeal 2011-005117
Application 09/707,156
Technology Center 1700

Before BRADLEY R. GARRIS, PETER F. KRATZ, and
KAREN M. HASTINGS, *Administrative Patent Judges*.

KRATZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1-14 and 21-26. We have jurisdiction pursuant to 35 U.S.C. § 6.

Appellants' claimed invention is directed to a spill-resistant container for removably containing an edible particulate candy substance and/or a candy article substance that includes a handle, such as a lollipop (Spec. 4, ll. 14-16).

Claim 1 is illustrative and reproduced below:

1. A container for inhibiting the spillage of contents of said container, wherein said container defines a substantially spherically shaped container having an inner cavity of a predetermined volume and an open funnel of a predetermined volume extending into said inner cavity to provide communication between said inner cavity and the exterior of said container, and wherein said container removably contains at least one substance of the following group of substances comprising an edible particulate candy substance, a candy article substance, and a combination of an edible particulate candy substance and a candy article substance, and wherein said candy article substance further includes a handle portion connected thereto, and wherein a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of the result of said container volume minus said funnel volume.

The Examiner relies on the following prior art references as evidence in rejecting the appealed claims:

McCombs	1,254,714	Jan. 29, 1918
Ciffo	2,917,766	Dec. 3, 1957
Meth	3,464,599	Sep. 2, 1969
McCaffery	3,781,164	Dec. 25, 1973
Price	3,840,678	Oct. 8, 1974
Vogelsang	4,522,523	Jun. 11, 1985
Williams	4,714,174	Dec. 22, 1987
Kennedy	4,869,390	Sep. 26, 1989
Patterson	5,105,975	Apr. 21, 1992
Schramm	5,246,046	Sep. 21, 1993
Coleman	5,370,884	Dec. 6, 1994

Martindale	5,758,797	Jun. 2, 1998
Hoeting et al	5,993,870	Nov. 30, 1999
Manzone ¹	6,159,492	Dec. 12, 2000
Baker	WO 00/19803	Apr. 13, 2000
Hunter	GB 1,428,356	Mar. 17, 1976
Beutlich	GB 1,485,581	Sep. 14, 1977
Corteggiani (as translated)	FR 2,673,917	Sep. 18, 1992
Tomatsu ² (as translated)	JP 11-227388	Aug. 24, 1999

Product Alert³, v29, n15, part 1, August 9, 1999

Product Alert⁴, v29, n15, part 2, August 9, 1999

Product Alert⁵, v28, n 6, March 23, 1998

Candy Warehouse webpage,

www.candywarehouse.com/sourpunpop24.html, March 27, 2003.

Exhibit A: Felix Powder Pop Photo, not dated

Exhibit B: Felix Sour Punker Pop, not dated

Exhibit D: Felix Sour Punker Pop webpage,

www.mexicool.com/weblucas/factory/punker.htm, March 27, 2003.

Exhibit F: Lucas/Felix Punkerpop Billing, Oct. 29, 1999

Exhibit G: Lucas Muecas Photo, not dated

¹ The Examiner inadvertently and incorrectly lists this reference with the Patent number assigned to the Vogelsang Patent (Ans. 3, 5, and 10). See the Notice of References Cited (PTO-892 form), reference K, which form is attached to the non-final Office action dated November 06, 2008. The Application filing date is March 4, 1999 (§ 102(e) date).

² The Examiner and Appellants refer to the reference as Pilot Ink (JP '388) (Ans. 5; App. Br. 4).

³ The Examiner and Appellants refer to this reference as Product Alert (8/9/99, part 1). (Ans. 5; App. Br. 4).

⁴ The Examiner and Appellants refer to this reference as Product Alert (8/9/99, part 2). (Ans. 5; App. Br. 4).

⁵ The Examiner and Appellants refer to this reference as Product Alert (3/23/98). (Ans. 5; App. Br. 4).

The Examiner maintains the following grounds of rejection⁶:

Claims 1-14 and 21-26 stand rejected under 35 U.S.C. § 112, first paragraph as failing to comply with the written description requirement.

Claims 1-14 and 21-26 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Product Alert (3/23/98), Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse, Exhibits A, B, D, F, and G, Baker, Coleman, Hoeting, Applicants' prior art admissions, Price, Hunter, Williams, Ciffo, Schramm '046, Martindale, Kennedy, Beutlich, McCombs, Meth, Patterson, Corteggiani, Pilot Ink, McCaffery, Vogelsang, and Manzone (Ans. 5-10).

Claims 1-14 and 21-26 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Price, Hunter, Williams, Ciffo, Schramm '046, Martindale, Kennedy, Beutlich, McCombs, Meth, Patterson, Corteggiani, Pilot Ink, McCaffery, Product Alert (3/23/98), Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse, Exhibits A, B, D, F, and G, Baker, Coleman, and Hoeting, Appellants' prior art admissions, Vogelsang, and Manzone (Ans. 10-14).

We reverse the written description rejection for reasons argued by Appellants. We affirm the obviousness rejections for substantially the reasons set forth by the Examiner in the Answer. Our reasoning follows.

⁶ This is the second appeal involving this Application. In a Decision electronically delivered on September 23, 2008, the Board affirmed obviousness rejections of the then pending rejected claims over a combination of references substantially similar to the references employed in the Examiner's obviousness rejections herein (Ciffo, Vogelsang and Manzone were not utilized in the earlier presented and affirmed rejections).

ISSUES

Did the Appellants indicate by their argument that the Examiner erred in determining that the appealed claims lack the requisite written descriptive support in the Specification, as filed, for certain amended claim recitations?

Did the Appellants indicate, via their arguments, that the Examiner erred in determining that the subject matter of claims 1-14 and 21-26 would have been obvious, within the meaning of 35 U.S.C. § 103(a), based on the combined teachings of the applied references?

WRITTEN DESCRIPTION UNDER 35 U.S.C. § 112, 1st PARAGRAPH

As our reviewing court stated in *In re Kaslow*, 707 F.2d 1366, 1375 (Fed. Cir. 1983):

The test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language...The content of the drawings may also be considered in determining compliance with the written description requirement. [Citations omitted.]

The Examiner has the initial burden of setting forth evidence or reasons why, as a matter of fact, the written description in the Specification as originally filed would not have reasonably conveyed to a person having ordinary skill in this art that the inventors were in possession of the invention defined by the appealed claims, including all of the limitations thereof, at the time the Application was filed. See, e.g., *In re Alton*, 76 F.3d 1168, 1172, 1175-76 (Fed. Cir. 1996) (citing *In re Wertheim*, 541 F.2d 257,

262-64 (CCPA 1976). Alleging a lack of literal support is not enough to carry the Examiner's initial burden. *In re Voss*, 557 F.2d 812, 817 (CCPA 1977); *In re Edwards*, 568 F.2d 1349, 1354 (CCPA 1978).

In an effort to satisfy this burden, the Examiner contends that the Specification, as originally filed, does not describe certain claim recitations involving spatial (volume/dimension) relationships between the removable particulate candy substance and/or the candy article that can be inserted in the container and the container itself because these relationships are not “disclosed in words” in the Specification and “it is not seen that the figures can be used to support spatial, including volumetric, relationships between elements” (Ans. 4 and 5).

However, contrary to the Examiner's contentions, we agree with Appellants in that the Examiner has not discharged the initial burden to establish that the Application disclosure, as filed, fails to furnish written descriptive support for the contested recitations of the rejected claims by the rejection presentation. In this regard, the Examiner's rejection focuses on words allegedly not used in the Specification rather than explaining why, in the Examiner's view, the description in the Application taken as a whole (including the pertinent referenced drawing figures), as filed, would not have been reasonably understood as conveying to a person having ordinary skill in the art that the named inventors were in possession of the claimed invention, including all of the allegedly non-described limitations thereof, at the time of filing.

The Examiner argues that the wherein recitation indicating that “a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of said container

volume” as recited in claim 8, as well as the slightly different particulate candy substance volume formulations as recited in claims 1 and 21 and certain other element spatial relations including a recited gap between an inserted candy article and a funnel second open end and the relative diameters of a candy article and its handle according to claim 21 are not supported by the Specification, as originally filed (Ans. 4 and 5). According to the Examiner, this is because these words are not in the Specification, as filed, and “it is not seen that the figures can be used to support spatial, including volumetric, relationships between elements” (Ans. 4 and 5).

However, there is no general prohibition against the use of the drawing figures alone or together with the Specification to provide descriptive support for claim recitations. In this regard, it is well settled that the content of the drawings may also be considered in determining compliance with the written description requirement. *See Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991); *In re Wolfensperger*, 302 F.2d 950, 955-956 (CCPA 1962) (“The issue here is whether there is supporting “disclosure” and it does not seem, under established procedure of long standing, approved by this court, to be of any legal significance whether the disclosure is found in the specification or in the drawings so long as it is there.”).

Concerning the particulate candy substance/container volume relationships recited in claim 8 and in claims 1 and 21, respectively, and the candy article/ container funnel gap and candy article diameter recitations of claim 21, we note that the Specification describes the particulate candy substance and the candy article (“lollipop type hard candy”) as being removably contained in the container, as is also recited in claims 1, 8, and 21

(Spec. 4). The upper and lower container members are each described as being of hollow, semi-hemispherical shape and, when combined, as shown in drawing Figures 1 and 3A-C, these members form a substantially hollow and substantially spherically shaped container having an open funnel therein (36, Fig. 3A), albeit the depicted container shows a flattened bottom (Spec. 6, Figs. 1 and 3A).

Also, as depicted in Figure 3C by broken line 60, the particulate candy substance can occupy a volume that is less than one half the volume of the container; and, as shown in figure 3B, the particulate candy is further indicated and described as occupying a volume corresponding to the particulate volume recitations of claims 1 and 21. As noted above, the particulate candy is described as being removable from the container in the Specification, as filed. Thus, the Examiner has not established that the named inventors were not in possession of a container that can have a relative volume of particulate candy in the container that occupies less than one half of the container volume, as indicated by the recitations in claims 1, 8, and 21, as evinced by the drawings and corresponding Specification disclosure, including the disclosed removability of the particulate candy from the container, as generally argued by Appellants (App. Br. 5; Reply Br. 2-3).

Similarly, with respect to the additional recitations respecting the spatial relationship between the candy article (lollipop 40, Figs. 3A-C) and funnel second open end (37, Figs. 3A-C) and the relative diameters of the candy article and handle (lollipop 40, Figs. 3A-C) providing for edible particulate candy flow through the gap and around the candy article exterior to enable coating thereof, the Examiner has not established that the drawing

Figures, such as Figures 3A-C, coupled with the Specification description (Spec. 4-7) fail to provide written descriptive support for these claim recitations, as basically argued by Appellants (App. Br. 6-7; Reply Br. 3-4).

Thus, Appellants have identified reversible error in the Examiner's finding that the Specification does not describe the claim recitations identified by the Examiner in the lack of written description rejection.

Accordingly, we reverse the Examiner's decision rejecting claims 1-14 and 21-26 under 35 U.S.C. § 112, first paragraph, as lacking written descriptive support for the presently claimed subject matter in the Application as originally filed.

REJECTIONS UNDER 35 U.S.C. § 103

Each of the Examiner's obviousness rejections involve all of the appealed claims and employ the same combination of references, albeit they are presented and utilized in different order. Moreover, Appellants argue the rejected claims together and present substantially identical arguments against the two obviousness grounds of rejection (App. Br. 7 and 8; Reply Br. 5). Accordingly, we consider these grounds of rejection together. We select claim 1, as the representative claim on which we decide this appeal as to these grounds of rejection.

The Examiner has found that Price discloses a container having an anti-spill cone (funnel) 14 extending therein and in fluid communication with the container exterior, the container being useful for holding and dispensing removable fluid food substance (20). Price teaches that "[f]luid food 20 is dispensed in the cup 10, the level thereof maintained below the cone 14 so that it will not spill out or overflow the cone 14 if the cup 10 is

overturned” (col. 2, ll. 3-6; Fig. 2: emphasis removed). While representative claim 1 requires a container that is substantially spherically shaped, Appellants do not argue that it would not have been obvious to employ a spherically shaped container (cup) in Price.⁷ In this regard, Price indicates that the cylindrical cup form is merely illustrative (col. 2, ll. 26-33) and Ciffo, one of the other references relied upon by the Examiner to evince prior art non-spillable containers, teaches the use of a substantially spherical bottle (container) shape (Ans. 10; Ciffo, Fig.1, bottle 10).

As indicated by the Examiner, representative claim 1 differs from Price in that claim 1 calls for a container that removably contains an edible candy substance, such as particulate candy. To the extent that a particular substance recited as being a removable content of the claimed container may indicate a product difference in the recited container of claim 1 over the container of Price, the Examiner has amply explained why it would have been obvious to one of ordinary skill in the art to employ an anti-spill container, such as the container of Price, for removably holding a particulate candy substance based on the additional teachings of Product Alert (3/23/98), as further evinced by the additional prior art references cited by the Examiner (Ans. 11-13). In this regard, the Examiner has found that Product Alert (3/23/98) teaches placing a candy powder in a container with a lid having an attached lollipop (Ans. 11; see generally Product Alert (3/23/98)). This determination is not specifically disputed by Appellants (see generally Appeal Brief and Reply Brief). Hence, the Examiner has

⁷ In this regard, arguments not timely made in the Briefs are considered to be waived. See 37 C.F.R. § 41.37(c)(1)(vii).

reasonably determined that it would have been obvious to one of ordinary skill in the art to modify Price by substituting one edible spillable material (particulate candy) for another spillable material (fluid food of Price). "The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 416. In making an obviousness determination one "can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR*, 550 U.S. at 418.

We recognize that several of the cited references (Exhibits A,B, D, and G and Candy Warehouse) have no established publication date and/or have a publication date subsequent to the filing date (November 06, 2000) of this application.⁸ The Examiner indicates that these references are only being utilized "to put a face, if you will, on the description of the product described in Product Alert (3/23/98)" (Ans. 6 and 12). In this regard, references can be used to show a state of universal fact though published later than an application filing date. *In re Wilson*, 311 F.2d 266, 268-269 (CCPA 1962). Here, the Examiner has relied on these references to show a state of fact, that is, to show that flowable candy would necessarily be subject to spilling (Ans. 6 and 11). In any event, the additional teachings of these references are unnecessary to the Examiner's obviousness position.

Appellants generally argue that the claims define over the applied references because none of the references "alone or in combination teach all of the elements/limitations of appellant's claims" and that the Examiner has

⁸ Appellants make no claim for benefits pursuant to 35 U.S.C. § 120 based on the filing dates of any of the earlier filed parent applications (Spec. 2, as amended).

not furnished a *prima facie* case of obviousness (App. Br. 7 and 8; Reply Br. 5). However, Appellants do not identify any particular limitation(s) of representative claim 1 that are not taught by or suggested to one of ordinary skill in the art by the combined teachings of the prior art references, as put forth by the Examiner in the stated obviousness rejections. Nor do Appellants direct us to any evidence of nonobviousness, such as unexpected results, for the claimed invention relative to the prior art.

While the Examiner has the initial burden of showing a *prima facie* case of obviousness, the Appellant has the burden on appeal to the Board to demonstrate error in the Examiner's position. See *In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) ("[t]o reject claims in an application under section 103, an examiner must show an un rebutted *prima facie* case of obviousness.... On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.") (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)). Here, Appellants' arguments do not indicate any harmful error in the Examiner's obviousness position.

On this record, we affirm the Examiner's obviousness rejections.

ORDER

The Examiner's decision to reject claims 1-14 and 21-26 pursuant to 35 U.S.C. § 112, first paragraph, as lacking written descriptive support for the presently claimed subject matter in the Application as originally filed is reversed.

The Examiner's decision to reject the appealed claims under 35 U.S.C. § 103(a) as unpatentable over the combined teachings of the applied references is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

tc